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OCTOBER TERM, 1993

PAUL PALALAUA TUILAEPA (No. 93-5131),
Petitioner,

vs.

THE STATE OF CALIFORNIA,
Respondent.

WILLIAM ARNOLD PROCTOR (No. 93-5161),
Petitioner,

vs.

THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE CALIFORNIA APPELLATE PROJECT IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE OF THE CALIFORNIA APPELLATE PROJECT IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The California Appellate Project ("CAP") is a non-profit corporation established by the State Bar of California. It is funded by the California Judicial Council to train and assist appointed counsel in providing representation in state death penalty appeals and habeas corpus proceedings. Pursuant to a grant from the Administrative Office of the United States Courts, CAP also

assists the federal courts by recruiting, training and assisting appointed counsel in federal habeas corpus proceedings on behalf of death-sentenced prisoners in California.

As an organization that provides assistance in many of the pending death judgment cases in California, CAP is in a unique position to provide the Court with an analysis of the questions presented in these consolidated cases.

CAP has received written consent of the parties to file this amicus brief.

SUMMARY OF ARGUMENT

When a state uses aggravating factors to minimize the risk of arbitrary imposition of the death sentence, it may not use factors which as a practical matter fail to guide the sentencer's discretion. In California, the instructions given to the jury make clear beyond any doubt that aggravating factors are a critical component of the jury's decision whether a defendant should live or die. Thus, these aggravating factors must comply with the Eighth Amendment; they must furnish the sentencer with clear standards that provide specific guidance as to whether death should be imposed.

In the two cases upon which certiorari has been granted, jurors were instructed that in determining if the defendant should be put to death, they could find and weigh as an aggravating factor "the circumstances of the crime" and the "age of the defendant." On their face, neither of these aggravating factors provides the sentencer with the type of specific and detailed guidance essential to aggravating factors used in determining if a defendant will live or die. Because the state supreme court has failed to provide any limiting construction of these factors, they have been used, from case to case, to generate illusory aggravators and inject constitutionally impermissible randomness and arbitrariness into the sentencing process.

A further source of confusion in the application of California's capital sentencing scheme is the California statute's failure to designate which of the statutory sentencing factors are mitigating. Although the state supreme court has construed seven of the factors to be exclusively mitigating, the court has declined to

require trial courts to either inform the jury that these factors are mitigating circumstances or delete these factors from the penalty phase instructions when they are factually irrelevant. As a result, in many California cases, juries have been invited to convert the absence of a statutory mitigating circumstance into the presence of an aggravating circumstance, thereby placing additional illusory factors on death's side of the scale and further distorting the decision making process.

ARGUMENT

The Eighth Amendment principles that apply to this case are clearly established by the Court's decisions. When a state chooses to impose capital punishment, the Eighth Amendment requires it to "adopt procedural safeguards against arbitrary and capricious impositions of the death penalty." *Sawyer v. Whitley*, 505 U.S. ____, 112 S. Ct. 2514, 2520 (1992). *Accord Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976). A state capital punishment scheme must comply with the Eighth Amendment's "fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action" in imposing the death penalty. *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988).

Where a state elects to meet this Eighth Amendment obligation by articulating a set of aggravating and mitigating factors, and where the aggravating factors are critical "in deciding who shall be eligible for the death penalty or who shall receive the death penalty, [the state] cannot use factors which as a practical matter fail to guide the sentencer's discretion." *Stringer v. Black*, 503 U.S. ____, 112 S. Ct. 1130, 1139 (1992). Thus, as the Court has repeatedly made clear, in states like Florida, Mississippi and Oklahoma — where the sentencer is told that it must weigh aggravating and mitigating factors to determine if a defendant should live or die — the state may not rely on unconstitutionally vague aggravating factors. *See, e.g., Espinosa v. Florida*, 505 U.S. ____, 112 S. Ct. 2926 (1992) (Florida); *Shell v. Mississippi*, 498 U.S. 1 (1990) (Mississippi); *Maynard v. Cartwright*, 486 U.S. 356 (1988) (Oklahoma).

I

THE AGGRAVATING FACTORS THAT A CALIFORNIA JURY WEIGHS IN DETERMINING WHETHER A DEFENDANT SHOULD LIVE OR DIE ARE CENTRAL TO THE PENALTY DETERMINATION.

As two Justices of this Court have recently noted, California — just like Florida, Mississippi and Oklahoma — "requires its juries to weigh aggravating and mitigating circumstances" in determining whether death is an appropriate penalty. *Pensinger v. California*, ___ U.S. ___, 112 S. Ct. 351 (1991) (O'Connor, J., dissenting from the denial of certiorari, joined by Kennedy, J.) *See also Boyde v. California*, 494 U.S. 370, 374, 377 (1990) (observing that California juries are told to weigh aggravating and mitigating circumstances in determining penalty); *California v. Brown*, 479 U.S. 538, 540 (1987) (same); *California v. Ramos*, 463 U.S. 992, 995 n.3 (1983) (same).

The statute explicitly requires the jury to determine the appropriate punishment by weighing aggravating circumstances against mitigating circumstances:

> [The trier of fact] shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in a state prison for life without the possibility of parole.

Cal. Pen. Code § 190.3.

The California Supreme Court has itself long recognized that the role of aggravating and mitigating factors in the penalty determination process is identical to the role those factors play in Florida, a state statute with which this Court has much experience. As early as 1979, in interpreting a predecessor statute to the current law which provided that the jury was to be guided by a list of aggravating and mitigating factors almost identical to that present in the current statute, the state court concluded that the factors set forth in section 190.3 are "essentially equivalent to the provision in the valid Florida statute requiring the sentencing

authority to 'weigh' [aggravating and mitigating] factors in reaching its decision." *People v. Frierson*, 25 Cal.3d 142, 180, 599 P.2d 587, 610 (1979).[1] The "California statute lists specific factors which must be considered in deciding whether or not to impose the death penalty." *Id.* at 177, 599 P.2d at 608. The state court explicitly concluded that use of the aggravating and mitigating factors under the California scheme was "almost identical" to the use of such factors in Florida. *Id.*

The state court has taken a similar view in interpreting the current statute, which requires that the jury not merely be "guided by" the aggravating and mitigating factors but "shall impose" death if aggravating factors outweigh mitigating factors. Reaffirming the central role played by the aggravating and mitigating factors, the court has noted that section 190.3 "require[s] the jury to decide the appropriateness of the death penalty by a process of weighing the specific factors listed in the statute." *People v. Boyd*, 38 Cal.3d 762, 773, 700 P.2d 782, 790 (1985). Indeed, as *Boyd* held, under the current statute, unlike the 1977 statute, the list of factors is exclusive, thus making the role of the statutory aggravating factors all the more important. *Id.* at 772-73, 700 P.2d at 789-90.

In a series of more recent cases, the court has continued to emphasize the critical role played by aggravating factors in the determination of penalty, noting that "the crux of the jury's decision is the weighing of aggravating and mitigating factors ...." *People v. Kaurish*, 52 Cal.3d 648, 706, 802 P.2d 278, 309 (1990), *cert. denied*, 112 S. Ct. 121 (1991). *Accord People v. Brown*, 40 Cal.3d 512, 544, 709 P.2d 440, 458 (1985), *rev'd. on other grounds*, 479 U.S. 538 (1987) ("[Section 190.3] simply

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[1] The predecessor statute was former California Penal Code section 190.3, a provision of California's 1977 death penalty legislation in effect from August 11, 1977 (Cal. Stats. 1977, ch. 316) until November 8, 1978, when it was superseded by the current statute, enacted by Initiative Measure, approved November 7, 1978. The factors listed under former section 190.3 were essentially identical to the factors listed under the current statute, with one exception, i.e., former section 190.3 did not include what is now factor (c) covering prior felony convictions.

makes clear that, in resolving the ultimate issue of punishment ... the jurors are to limit their consideration to 'the specific factors listed in the statute.' ")[2]

Amicus recognizes that in a case decided *after* this Court granted certiorari in *Proctor* and *Tuilaepa*, the state court has departed from its historic view as to the role of aggravating factors under the California statute. The state court has now held that because the factors in section 190.3 are "only" used to determine whether a defendant should live or die, and do not determine whether the defendant is "death eligible," the full dictates of the Eighth Amendment do not apply to those factors. *People v. Bacigalupo*, 6 Cal.4th 457, 475, 862 P.2d 808, (1993), *on remand from Bacigalupo v. California*, 506 U.S. ____, 113 S. Ct. 32 (1992).

In reaching this conclusion, the state court also articulated a very new, and much more limited, role for the factors set forth in section 190.3, a role that it concluded exempts these factors from the Eighth Amendment scrutiny applied to aggravating factors in every other state. According to the state court's current view, the factors set forth in section 190.3 are no longer "essentially equivalent" to the aggravating factors in Florida. Instead, "the section 190.3 'aggravating' factors in California's capital sentencing scheme do no more than direct attention" to "facts about the offense and the offender that will weigh in the sentencing decision in favor of the more severe penalty of death." *People v. Bacigalupo*, 6 Cal.4th at 477, 862 P.2d at ____. On this basis, the

[2] In *Brown*, the state court also held that the weighing process mandated by state law was not to be a mere counting of aggravating and mitigating factors. Instead, the jury was to weigh aggravating and mitigating factors and decide if death was the appropriate punishment. 40 Cal.3d at 543-44, 709 P.2d at 455-56. In reaching this interpretation, the state court once again explicitly reaffirmed that it was construing the California statute to be just like Florida's. *Id.* at 543, 709 P.2d at 456-57. *See Barclay v. Florida*, 463 U.S. 939, 963-64 (1983) (concurring opinion of Stevens, J., describing Florida scheme). Indeed, the same is true in Mississippi; although the jury is told to weigh aggravating and mitigating circumstances, its ultimate responsibility is to determine if death is the appropriate punishment. Miss. Code Ann. § 99-19-101(d).

court concluded that the state was free to use factors which as a practical matter fail to guide the sentencer's discretion. *Id.*

Of course, as a matter of federal law, the state court's view that aggravating factors used only to determine whether a defendant should live or die are exempt from full constitutional scrutiny is simply wrong. Justice Kennedy's opinion for the Court in *Stringer v. Black* could not have been more clear as to this point, squarely holding that "if a State uses aggravating factors in deciding who shall be eligible for the death penalty or who shall receive the death penalty, [the State] cannot use factors which as a practical matter fail to guide the sentencer's discretion." 503 U.S. at ____, 112 S. Ct. at 1139.

Conceivably, if a jury were instructed in accord with the state court's current view of the limited role of section 190.3 factors, the state might be free at the penalty phase to call the jury's attention to facts which do not in any way objectively guide the sentencer's discretion.[3] However, in the two cases now before this Court — and others presented to sentencing juries prior to the state court's recent *Bacigalupo* decision — the instructions and argument given simply do not reflect the state court's current limited view of the section 190.3 factors. *See Shuttlesworth v. Birmingham*, 382 U.S. 87, 91-92 (1965) (in addressing a vagueness challenge to a state statute, courts must look at judicial interpretations of the statute at the time it was applied to defendant). *Accord Smith v. Goguen*, 415 U.S. 566, 570-72 (1974); *Lanzetta v. New Jersey*, 306 U.S. 451, 456-57 (1939). To the contrary, these instructions are consistent with the state court's then current approach to section 190.3 which "require[d]

[3] If this were the case, however, the full burden of insuring that the jury receives constitutionally adequate guidance would necessarily fall upon the "special circumstance" findings made at the guilt phase. Given that California has the broadest array of special circumstance findings used to make a defendant death eligible in the entire country, intended by the drafters of the statute in their own words to "apply to every murderer," it is not at all clear that California would be left with a constitutional statute under this construction. 1978 California Voter's Pamphlet, p. 34, Argument in Support of Proposition 7. This question is not before the Court in these cases, however.

[the] jur[y] to weigh [the] aggravating and mitigating circumstances" in determining whether death was an appropriate penalty. *Pensinger v. California*, ____ U.S. at ____, 112 S. Ct. at 351.

In fact, consistent with the state court's longstanding approach to section 190.3, an examination of California capital cases shows beyond any doubt that prosecutors throughout the state have long been advising juries that the process they are required to engage in before imposing a death sentence is a weighing of the statutory aggravating and mitigating factors. The following are representative arguments from prosecutors in California death penalty trials:

- "You might list all of the mitigating factors on one side of the scale, list all of the aggravating factors on the other side of the scale, and make a finding of fact and answer this question: Did the aggravating factors outweigh the mitigating factors? . . . If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death." *People v. Hendricks*, 44 Cal.3d 635, 658, 749 P.2d 836, 849, *cert. denied*, 488 U.S. 900 (1988).

- "If you decide that the aggravating circumstances outweigh the mitigating circumstances, then you must return a verdict of death." *People v. McLain*, 46 Cal.3d 97, 117, 757 P.2d 569, 580 (1988), *cert. denied*, 489 U.S. 1072 (1989).

- "If you find that aggravating factors outweigh, and it can be a slight outweigh, it will be your obligation to return a verdict of death." *People v. Boyde*, 46 Cal.3d 212, 262-63, 758 P.2d 25, 55 (1988), *aff'd*, 494 U.S. 370 (1990).

- "The law . . . boils down to a simple solution of balancing. You have to balance in this case a set of aggravating factors versus a set of mitigating factors. And if you find that one of the factors outweighs the other, then it's simply your duty as jurors to make a decision in favor of those factors which outweigh the other." *People v. Bean*, 46 Cal.3d 919, 956, 760 P.2d 996, 1019 (1988), *cert. denied*, 494 U.S. 1038 (1990).

- "[I]f you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose the sentence of death." *People v. Hamilton*, 48 Cal.3d 1142, 1181, 774 P.2d 730, 754 (1989), *cert. denied*, 494 U.S. 1039 (1990).

- If aggravating factors outweigh mitigating factors "[y]ou do not have [any] discretion. . . . [I]t is your duty to return a verdict of death." *People v. Kaurish*, 52 Cal.3d 648, 713-14, 802 P.2d 278, 314 (1990), *cert. denied*, 112 S. Ct. 121 (1991).

- "So if you conclude that the aggravating circumstances outweigh the mitigating circumstances, you are obligated to return a verdict of death." *People v. Proctor*, 4 Cal.4th 499, 547, 842 P.2d 1100, 1128 (1992), *cert. granted*, 114 S. Ct. 598 (1993).

These statements illustrate that in practice, as well as under the state court's longstanding construction of the state statute, the aggravating and mitigating factors set forth in section 190.3 are central to the penalty determination. Indeed, in accord with the statute, prosecutors arguing for a death sentence have often prepared and presented charts containing a list of the aggravating and mitigating factors in a particular case and taken pains to urge the jury to find each and every aggravating factor on the list.[4] This approach is a natural response to a scheme which requires the

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[4] *See, e.g., People v. Montiel*, 5 Cal.4th 877, 939 n.36, 855 P.2d 1277, 1313 n.36 (1993); *People v. Clark*, 3 Cal.4th 41, 165 n.24, 833 P.2d 561, 632 n.24 (1992), *cert. denied*, 113 S. Ct. 1604 (1993); *People v. Hardy*, 2 Cal.4th 86, 202, 825 P.2d 781, 852, *cert. denied*, 113 S. Ct. 498 (1992); *People v. Gonzalez*, 51 Cal.3d 1179, 1228-29, 1230 n.28, 800 P.2d 1159, 1184-85 n.28 (1990), *cert. denied*, 112 S. Ct. 117 (1991); *People v. Douglas*, 50 Cal.3d 468, 537, 788 P.2d 640, 681 (1990), *cert. denied*, 498 U.S. 1110 (1991); *People v. Hamilton*, 48 Cal.3d 1142, 1183-86, 774 P.2d 730, 755-57 (1989), *cert. denied*, 494 U.S. 1039 (1990); *Id.* at 1188 and 1192 (Broussard, J., dissenting in part); *People v. Guzman*, 45 Cal.3d 915, 971-72, 755 P.2d 917, 952-53 (1988), *cert. denied*, 488 U.S. 1050 (1989) (Mosk, J., dissenting in part); *People v. Ghent*, 43 Cal.3d 739, 782, 739 P.2d 1250, 1278 (1987), *cert. denied*, 485 U.S. 929 (1988) (Broussard, J., concurring).

jury to weigh aggravating and mitigating factors. Obviously, before a jury can weigh such factors, it must necessarily make a finding as to which aggravating factors actually go into the weighing process. It is inconceivable that a jury charged with the solemn task of weighing aggravating and mitigating factors to determine whether a defendant will live or die would engage in that task without deciding which aggravating factors have been established. Indeed, it is impossible to engage in the mandated weighing process without making findings regarding the existence or non-existence of particular aggravating factors.[5]

It is clear, therefore, that aggravating factors under the California scheme are a critical facet of the jury's decision whether to sentence a defendant to death. Their function in the sentencing process subjects them to the constitutional rule that where a state chooses to make "aggravating factors . . . central in the weighing phase of a capital sentencing proceeding . . . use of a vague or imprecise aggravating factor in the weighing process invalidates the sentence and at the very least requires constitutional harmless error analysis or appellate reweighing in the state judicial system." *Stringer v. Black*, 503 U.S. at ____, 112 S. Ct. at 1140.[6]

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[5] In *Proctor v. California*, No. 93-5161, the jury was instructed that "before you may consider a particular aggravating circumstance to be true, you must be satisfied of the existence of that aggravating circumstance beyond a reasonable doubt." (RT 1558.)

[6] In *Proctor* and *Tuilaepa* the instructions, closing arguments and verdict forms made quite clear that the aggravating factors were critical to the jury's ultimate determination of penalty. *Proctor v. California*, No. 93-5161, RT 1474, 1558, 1562; CT 479 (instructions, argument and verdict forms all told the jury that if aggravating factors outweighed mitigating factors, it was required to impose a death sentence); *Tuilaepa v. California*, No. 93-5131, (RT 839, 864, 870, 885-87; CT 225-26) (instructions, argument and verdict forms all told the jury that the weighing process was central to the sentencing determination, and that death could be imposed only if the aggravating circumstances substantially outweighed the mitigating circumstances).

II

WHERE A SENTENCING JURY IS INSTRUCTED TO WEIGH AGGRAVATING AND MITIGATING CIRCUMSTANCES IN DETERMINING WHETHER THE DEFENDANT SHOULD LIVE OR DIE, INSTRUCTING THE JURY TO WEIGH AS AN AGGRAVATING CIRCUMSTANCE THE "CIRCUMSTANCES OF THE CRIME" OR THE "AGE" OF THE DEFENDANT VIOLATES THE EIGHTH AMENDMENT.

A. An Aggravating Factor Is Unconstitutionally Vague Where Its Own Terms Furnish No Discernible Standards For The Sentencer And The State Courts Have Failed To Provide A Limiting Construction.

This Court has repeatedly held that when a state chooses to rely upon the presence of aggravating factors to satisfy the "fundamental constitutional requirement [of] sufficiently minimizing the risk of wholly arbitrary and capricious action," those factors must furnish the sentencer with "clear and objective standards" that provide "specific and detailed guidance." *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980); *Gregg v. Georgia*, 428 U.S. 153, 198 (1976); *Proffitt v. Florida*, 428 U.S. 242, 253 (1976). An aggravating factor is unconstitutionally vague "if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." *Espinosa v. Florida*, 505 U.S. at ____, 112 S. Ct. at 2928.

The first step in deciding whether a particular aggravating factor is unconstitutionally vague is to "determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer." *Arave v. Creech*, 507 U.S. ____, 113 S. Ct. 1534, 1541 (1993). If the language is indeed vague, the next step is to determine whether the "state courts have further defined the vague terms" with a constitutionally sufficient limiting construction. *Id.*

To determine whether an aggravating circumstance is unclear —or whether a proper limiting construction has been utilized— requires an inquiry into state court applications of the aggravating

factor. *See, e.g. Sochor v. Florida*, 504 U.S. ____, 112 S. Ct. 2114, 2121-22 (1992); *Proffitt v. Florida*, 428 U.S. at 255, n.12 (joint opinion of Stewart, Powell and Stevens, JJ.). *Accord Arave v. Creech*, 507 U.S. at ____, 113 S. Ct. at 1544. Where those applications reveal that the state courts have never articulated a limiting construction which provides "specific and detailed guidance," the aggravating factor is constitutionally infirm. *Maynard v. Cartwright*, 486 U.S. at 360-64; *Godfrey v. Georgia*, 446 U.S. at 428-33. *See also Clemons v. Mississippi*, 494 U.S. 738, 756 (1990) (Blackmun, J. concurring).

B. Instructing The Jury In The Bare Terms Of Penal Code Section 190.3(a) To Weigh The "Circumstances Of The Crime" Aggravating Factor In Deciding Whether A Defendant Should Live Or Die, Without Any Limiting Construction, Is Unconstitutional.

California Penal Code section 190.3(a) authorizes the sentencing jury to weigh the "circumstances of the crime" as an aggravating factor. There can be no serious dispute that this statutory language "fails to furnish principled guidance for the choice between death and a lesser penalty." *Richmond v. Lewis*, 506 U.S. ____, 113 S. Ct. 528, 534 (1992).

In fact, the Court has long held that a sentencer may *not* simply look at the circumstances surrounding a crime and determine that a death penalty is appropriate. *See, e.g., Maynard v. Cartwright*, 486 U.S. at 363; *Godfrey v. Georgia*, 446 U.S. at 429-33; *Furman v. Georgia*, 408 U.S. 238, 239-40, 255-57, 309-10, 314 (1972). As the Court concluded unanimously in *Maynard*, "[w]e have plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty." 486 U.S. at 363. *Accord Cartwright v. Maynard*, 822 F.2d 1477, 1491 (10th Cir. 1987), *aff'd*, 486 U.S. 356 (1988) ("the discretion of a sentencer who can rely upon all the circumstances of a murder is as complete and as unbridled as the discretion afforded the jury in *Furman*").

Thus, on its face the aggravating factor set forth in section 190.3(a) violates the Eighth Amendment's requirement that aggravating factors central to the penalty determination furnish the sentencer with "clear and objective standards" that provide "specific and detailed guidance." The question then becomes whether the state courts have articulated and applied a limiting construction to this factor.

Certainly the state supreme court has never articulated a limiting construction of the "circumstances of the crime" aggravating factor. That court has seen no need to do so because it has consistently held that the language of the statute is neither '"illusory' nor otherwise impermissibly 'vague'." *People v. Tuilaepa*, 4 Cal.4th at 595, 842 P.2d at 1158. *Accord People v. Proctor*, 4 Cal.4th at 551, 842 P.2d at 1130; *People v. Noguera*, 4 Cal.4th 599, 648-49, 842 P.2d 1160, 1189-90 (1992); *People v. Sims*, 5 Cal.4th 405, 465-66, 853 P.2d 992, 1030 (1993). Indeed, in admitting that it had not yet "explored the outer reaches" of facts which would comprise the "circumstances of the crime" aggravating factor, the state court has actually expanded the definition of this factor, noting that it "does not mean merely the immediate temporal and spatial circumstances of the crime." *People v. Edwards*, 54 Cal.3d 787, 833, 835, 819 P.2d 436, 467 (1991), *cert. denied*, 113 S. Ct. 642 (1992) (emphasis added).

Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, the state supreme court has never applied a limiting construction to this factor. Instead, the state court has remained true to the extraordinary expansion of this factor announced in *Edwards*, approving reliance on the "circumstance of the crime" aggravating factor because defendant had a "hatred of religion,"[7] or because three weeks after the crime defendant sought to conceal evidence,[8] or threatened wit-

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[7] *People v. Nicolaus*, 54 Cal.3d 551, 581-82, 817 P.2d 893, 908-09 (1991), *cert. denied*, 112 S. Ct. 3040 (1992).

[8] *People v. Walker*, 47 Cal.3d 605, 639 n.10, 765 P.2d 70, 90 n.10 (1988), *cert. denied*, 494 U.S. 1038 (1990).

nesses after his arrest,[9] or disposed of the victim's body in a manner that precluded its recovery.[10]

Nor has the state supreme court's refusal to articulate a limiting construction for factor (a) gone unnoticed by the state's prosecutors. To the contrary, prosecutors throughout the state have capitalized on the extraordinary breadth of factor (a) to argue that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Thus, prosecutors have been permitted to argue that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

- Because the defendant struck many blows and inflicted multiple wounds,[11] or because the defendant killed with a single execution-style wound.[12]

- Because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification)[13] or because the defendant killed the victim without any motive at all.[14]

- Because the defendant killed the victim in cold blood[15] or because the defendant killed the victim during a savage frenzy.[16]

- Because the defendant engaged in a cover up to conceal his crime,[17] or because the defendant did not engage in a cover up and so must have been proud of it.[18]

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[9] *People v. Hardy*, 2 Cal.4th 86, 204, 825 P.2d 781, 853, *cert. denied*, 113 S. Ct. 498 (1992).

[10] *People v. Bittaker*, 48 Cal.3d 1046, 1110 n.35, 774 P.2d 659, 697 n.35 (1989), *cert. denied*, 496 U.S. 931 (1990).

[11] *See, e.g., People v. Morales*, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-98 (same); *People v. Carrera*, No. S004569, RT 160-61 (same).

[12] *See, e.g., People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-27 (same).

[13] *See, e.g., People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-69 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-60 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3543-44 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge).

[14] *See, e.g., People v. Edwards*, No. S004755, RT 10544 (defendant killed for no reason); *People v. Osband*, No. S005233, RT 3650 (same); *People v. Hawkins*, No. S014199, RT 6801 (same).

[15] *See, e.g., People v. Visciotti*, No. S004597, RT 3296-97 (defendant killed in cold blood).

[16] *See, e.g., People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

[17] *See, e.g., People v. Stewart*, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim).

[18] *See, e.g., People v. Adcox*, No. S004558, RT 4607 (defendant freely informs others about crime); *People v. Williams*, No. S004365, RT 3030-31 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

- Because the defendant made the victim endure the terror of anticipating a violent death[19] **or** because the defendant killed instantly without any warning.[20]
- Because the victim had children,[21] **or** because the victim had not yet had a chance to have children.[22]
- Because the victim struggled prior to death,[23] **or** because the victim did not struggle.[24]
- Because the defendant had a prior relationship with the victim,[25] **or** because the victim was a complete stranger to the defendant.[26]

These examples show that absent any limitation on the "circumstances of the crime" aggravating factor, different prosecutors have urged juries to find this aggravating factor and place it on death's side of the scale based on squarely conflicting circumstances.

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[19] *See, e.g., People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11125; *People v. Hamilton*, No. S004363, RT 4623.

[20] *See, e.g., People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

[21] *See, e.g., People v. Zapien*, No. S004762, RT 37 (Jan. 23, 1987) (victim had children).

[22] *See, e.g., People v. Carpenter*, No. S004654, RT 16752 (victim had not yet had children).

[23] *See, e.g., People v. Dunkle*, No. S014200, RT 3812 (victim struggled); *People v. Webb*, No. S006938, RT 5302 (same); *People v. Lucas*, No. S004788, RT 2998 (same).

[24] *See, e.g., People v. Fauber*, No. S005868, RT 5546-47 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

[25] *See, e.g., People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-67 (same); *People v. Kaurish*, 52 Cal.3d at 717, 802 P.2d at 316 (same).

[26] *See, e.g., People v. Anderson*, No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

Of equal importance, prosecutors have been permitted to use the "circumstances of the crime" aggravating factor to embrace facts which cover the entire spectrum of facets inevitably present in every homicide:

- *The age of the victim.* Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly;[27]
- *The method of killing.* Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[28]
- *The motive of the killing.* Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[29]

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[27] *See, e.g., People v. Deere*, No. S004722, RT 155-56 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT 10075 (victims were adolescents, ages 14, 15 and 17); *People v. Kipp*, No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter*, No. S004654, RT 16752 (victim was 20); *People v. Phillips*, 41 Cal.3d 29, 63, 711 P.2d 423, 444 (1985) (26-year-old victim was "in the prime of his life"); *People v. Samayoa*, No. S006284, XL RT 49 (victim was an adult "in her prime"); *People v. Kimble*, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton*, No. S004518, RT 4376 (victim was 77); *People v. Bean*, No. S004387, RT 4715-16 (victim was "elderly").

[28] *See, e.g., People v. Clair*, No. S004789, RT 2474-75 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an ax); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-87 (use of a club); *People v. Jackson*, No. S010723, RT 8075-76 (use of a gun); *People v. Reilly*, No. S004607, RT 14040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

[29] *See, e.g., People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-70 (same); *People v.*

- *The time of the killing.* Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day.[30]

- *The location of the killing.* Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park or in a remote location.[31]

The foregoing examples of how the factor (a) aggravating circumstance is actually being applied in practice make clear beyond peradventure that it is being relied upon as an aggravating factor in every case, by every prosecutor, without any limitation whatever. As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts—or facts that are inevitable variations of every homicide—into an aggravating factor which the jury is urged to weigh on death's side of the scale. This is the precise type of arbitrariness which, as *Stringer* warns, is created by vague aggravating factors weighed in the sentencing process.

Belmontes, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-61 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge); *People v. Edwards*, No. S004755, RT 10544 (no motive at all).

[30] *See, e.g., People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night); *People v. Avena*, No. S004422, RT 2603-04 (late at night); *People v. Lucero*, No. S012568, RT 4125-26 (middle of the day).

[31] *See, e.g., People v. Anderson*, No. S004385, RT 3167-68 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-11 (public bar); *People v. Ashmus*, No. S004723, RT 7340-41 (city park); *People v. Carpenter*, No. S004654, RT 16749-50 (forested area); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).

In practice, section 190.3's broad "circumstances of the crime" aggravating factor allows *precisely* what *Maynard* sought to preclude. It licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." *Maynard v. Cartwright*, 486 U.S. at 363. Thus, instructing the jury in the bare terms of section 190.3 violates the Eighth Amendment.

C. Allowing The Jury To Weigh The Aggravating Factor Of The Defendant's Age, As It Has Been Broadly Construed By The State Supreme Court, Violates The Eighth Amendment.

California Penal Code section 190.3(i) directs the jury to consider the "age of the defendant at the time of the crime." On its face, this statute gives the jury no guidance as to what age might constitute an aggravating factor, or what standards should be used in making this decision. Thus, on its face, this factor violates the Eighth Amendment's requirement that aggravating factors provide the sentencer with clear, specific guidance.

The state supreme court has not only failed to articulate a limiting construction of the age factor that would cure its vagueness, but it has articulated a definition of "age" that makes it as vague and standardless as it possibly could be. The California Supreme Court has not limited this factor to simple chronological age. Rather, it has interpreted this factor to be "a metonym for *any age-related matter* suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty." *People v. Lucky*, 45 Cal.3d 259, 302, 753 P.2d 1052, 1080 (1988), *cert. denied*, 488 U.S. 1034 (1989) (emphasis added).[32]

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[32] The state court has in fact held that factor (i) does not permit aggravation on the basis of "mere chronological age," *People v. Lucky*, 45 Cal.3d at 302, 753 P.2d at 1080; *People v. Rodriguez*, 42 Cal.3d 730, 789, 726 P.2d 113, 151 (1986), but it has never required that either this limitation on factor (i) or the court's expansive metonym construction of the factor be conveyed to California sentencing juries.

Once again, the state supreme court's unwillingness to articulate a limiting construction for this factor has not gone unnoticed by the state's prosecutors. Prosecutors throughout the state have capitalized on this failure, applying it exactly the way one would expect based on the state court's interpretation — inconsistently and arbitrarily. Thus, although a defendant cannot be subjected to the death penalty in California unless he was at least 18 years old at the time of the crime, in some cases prosecutors have argued that the age factor was aggravating where the defendant was in his late teens or early twenties at the time of the crime, while in other cases they have conceded that the defendant's youth was a mitigating factor. Prosecutors have argued that:

- Age 18 is an aggravating factor.[33]
- Age 19 is an aggravating factor.[34]
- Age 20 is a mitigating factor.[35]

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[33] *See, e.g., People v. Noguera*, No. S005170, RT 8640-41; *People v. Kimble*, No. S004364, RT 3348-51. But see *People v. Leach*, 41 Cal.3d 92, 111, 710 P.2d 893, 904 (1985) (California Supreme Court treats age 18 as a mitigating factor); *People v. Bell*, No. S004260, RT 1023 (prosecutor asserts that *had* defendant been 18 years old at the time of the crime it would be appropriate to treat age as a mitigating factor); *People v. Babbitt*, S22692, RT 5105 (same); *People v. Anderson*, No. S004385, RT 3156-57 (same); *People v. Kaurish*, No. S004640, RT 4562 (same); *People v. DeSantis*, No. S004706, RT 19840 (same); *People v. Fairbank*, No. S012032, RT 3610 (same); *People v. Ghent*, No. S004309, RT 2566 (same); *People v. Pinholster*, No. S004616, RT 7440 (same); *People v. Jennings*, 46 Cal.3d 963, 989, 760 P.2d 475, 491 (1988), *cert. denied*, 489 U.S. 1091 (1989) (same).

[34] *See, e.g., People v. Williams*, No. S004522, RT 1041; *People v. Avena*, No. S004422, RT 2611-12; *People v. Boyette*, No. S032736, RT 2007, 2014.

[35] *See, e.g., People v. Babbitt*, No. S22692, RT 5105; *People v. Carrera*, No. S004569, RT 173. *But see People v. Bean*, 46 Cal.3d at 952 n.18, 760 P.2d at 1017 n.18, No. S004387, RT 4718-19 (age 20 is aggravating).

- Age 21 is an aggravating factor.[36]
- Age 22 is an aggravating factor.[37]
- Age 24 is a mitigating factor.[38]

Even in the same case, the prosecutor and the trial judge have come to opposite conclusions about whether to treat the defendant's age as an aggravating factor, a mitigating factor, or neither:

- District attorney argued that age 19 was aggravating, but trial judge concluded that it was mitigating.[39]
- District attorney argued that age 19 was aggravating, but trial judge concluded that it was neutral.[40]
- District attorney argued that 21 could be either mitigating or aggravating, but trial judge concluded it was not mitigating.[41]

In practice, prosecutors and trial judges have applied the aggravating factor of age to defendants of virtually every age. They have applied it to defendants who were in their teens,[42]

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[36] *See, e.g., People v. Rundle*, No. S012943, RT 9450.

[37] *See, e.g., People v. Mitcham*, 1 Cal.4th 1027, 1076, 824 P.2d 1277, 1310, *cert. denied*, 113 S. Ct. 349 (1992), No. S004636, RT 1908.

[38] *See, e.g., People v. Raley*, No. S005870, RT 9293.

[39] *People v. Williams*, No. S004522, RT 1041, 1155.

[40] *People v. Avena*, No. S004422, RT 2611-12, 2750-51.

[41] *People v. Berryman*, No. S008182, RT 3992, Pronouncement of Judgment at 12.

[42] *See, e.g., People v. Williams*, No. S004522, RT 1041; *People v. Avena*, No. S004422, RT 2611-12; *People v. Boyette*, No. S032736, RT 2007, 2014.

twenties,[43] thirties,[44] forties,[45] and fifties[46] at the time of the crime. These examples demonstrate that, like the "circumstances of the crime," the "age of the defendant," in practice, is exactly the type of vague, illusory aggravating factor that, as *Stringer* warned, injects arbitrariness into the sentencing process.

III

BECAUSE THE CALIFORNIA SUPREME COURT HAS NOT REQUIRED THAT JURIES BE INSTRUCTED AS TO WHICH OF THE FACTORS CONTAINED IN PENAL CODE SECTION 190.3 ARE EXCLUSIVELY MITIGATING, THE ABSENCE OF STATUTORY MITIGATING FACTORS HAS BEEN USED TO CREATE ILLUSORY AGGRAVATING FACTORS.

Penal Code section 190.3 contains a single list of factors and does not designate which factors are aggravating and which are mitigating. The California Supreme Court, however, has made clear that some of the listed factors are intended to be exclusively

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[43] *See, e.g., People v. Bean*, 46 Cal.3d at 952, n.18, 760 P.2d at 1017 n.18, No. S004387, RT 4718-19 (age 20); *People v. Coleman*, 48 Cal.3d 112, 153-54, 768 P.2d 32, 55-56 (1989), *cert. denied*, 494 U.S. 1038 (1990) (age 22); *People v. Sandoval*, 4 Cal.4th 155, 189-90, 841 P.2d 862, 880 (1992), *cert. granted, in part*, 114 S. Ct. 40 (1993) (age 26).

[44] *See, e.g., People v. Gonzalez*, 51 Cal.3d 1179, 1233, 800 P.2d 1159, 1187 (1990), *cert. denied*, 112 S. Ct. 117 (1991) (age 31); *People v. Whitt*, 51 Cal.3d 620, 654, 798 P.2d 849, 869 (1990), *cert. denied*, 111 S. Ct. 2816 (1991) (age 30); *People v. Brown*, 46 Cal.3d 432, 455-56, 758 P.2d 1135, 1151 (1988), *cert. denied*, 489 U.S. 1059 (1989) (age 34); *People v. Edwards*, 54 Cal.3d 787, 844, 819 P.2d 436, 470 (1991), *cert. denied*, 113 S. Ct. 642 (1992) (age 37).

[45] *See, e.g., People v. McLain*, 46 Cal.3d 97, 111-12, 757 P.2d 569, 576-77 (1988), *cert. denied*, 489 U.S. 1072 (1989) (age 41).

[46] *See, e.g., People v. Douglas*, 50 Cal.3d 468, 538, 788 P.2d 640 (1990), *cert. denied*, 498 U.S. 1110 (1991). *See also People v. Nicolaus*, 54 Cal.3d 551, 587, 817 P.2d 893, 913 (1991), *cert. denied*, 112 S. Ct. 3040 (1992).

mitigating. *People v. Davenport*, 41 Cal.3d 247, 288-89, 710 P.2d 861, 888 (1985); *People v. Melton*, 44 Cal.3d 713, 770, 750 P.2d 741, 775, *cert. denied*, 488 U.S. 934 (1988); *People v. Lucero*, 44 Cal.3d 1006, 1031 n.15, 750 P.2d 1342, 1356-57 n.15 (1988); *People v. Hamilton*, 48 Cal.3d 1142, 1184, 774 P.2d 730, 755 (1989), *cert. denied*, 494 U.S. 1039 (1990). These factors are:

> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
>
> (f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
>
> (g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.
>
> (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.
>
> (j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.[47]

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[47] Factors (d) through (h) and factor (j) of the California statute repeat almost verbatim the language of six of the factors listed in the Model Penal Code. *See* Model Penal Code §§ 210.6(b)-(g). The only significant difference is that the California statute added the confusing prefatory phrase "whether or not."

Some uncertainty has recently arisen as to factor (j). The state court had previously held that factor (j) (the defendant was a minor participant in the offense) was an exclusively mitigating factor. *See, e.g., Hamilton*, 48 Cal.3d at 1184, 774 P.2d at 755, and cases cited in *People v. Proctor*, 4 Cal.4th 499, 553, 842 P.2d 1100, 1132. But in *Proctor*, the court suggested that the defendant's sole participation in the offense

The state court has also made clear that the absence of these mitigating factors in a particular case is not to be considered an aggravating factor. As the court explained, the "purpose of 'aggravating' and 'mitigating' factors is to assess the seriousness of a capital crime in relation to others of the same general character." *People v. Rodriguez*, 42 Cal.3d 730, 788, 726 P.2d 113, 151 (1986). An aggravating circumstance is "a circumstance above and beyond the essential constituent of a crime which increases its guilt or enormity or adds to its injurious consequences." *People v. Davenport*, 41 Cal.3d at 289, 710 P.2d at 888. The absence of a mitigating factor is not a meaningful aggravating factor, because "the absence of mitigation would not automatically render the crime more offensive than any other murder of the same general character." *Id.*

Despite this recognition, the court has refused to require that juries be instructed that the exclusively mitigating factors are mitigating only,[48] or that these factors be deleted from the instructions when factually irrelevant.[49] The court has reasoned that "the aggravating or mitigating nature of these various factors

might be considered an aggravating factor under factor (j). *Id.*, 4 Cal.4th at 553, 842 P.2d at 1132. *See also, People v. Howard*, 1 Cal.4th 1132, 1195, 824 P.2d 1315, 1353, *cert. denied*, 113 S. Ct. 383 (1992).

[48] *See, e.g., People v. Raley*, 2 Cal.4th 870, 919, 830 P.2d 712, 744-45 (1992), *cert. denied*, 113 S. Ct. 1352 (1993); *People v. Jackson*, 28 Cal.3d 264, 316, 618 P.2d 149, 176 (1980), *cert. denied*, 450 U.S. 1035 (1981).

[49] *See, e.g., People v. Sims*, 5 Cal.4th 405, 465, 853 P.2d 992, 1029-30 (1993); *People v. Miranda*, 44 Cal.3d 57, 104-05, 744 P.2d 1127 (1987), *cert. denied*, 486 U.S. 1038 (1988); *People v. Ghent*, 43 Cal.3d 739, 776-77, 739 P.2d 1250, 1274 (1987), *cert. denied*, 485 U.S. 929 (1988).

Although not required to do so, trial judges have on occasion deleted statutory factors not raised by the evidence. This occurred at petitioner Tuilaepa's trial, where the jury was instructed on factors (a), (b), (c), (i) and (k) only (RT 885). In contrast, the jury at petitioner Proctor's trial was instructed on all of the factors contained in section 190.3, and the prosecutor argued that nine of the statutory factors — every factor except factors (b) (presence or absence of violent criminal activity) and

should be self-evident to any reasonable person within the context of each particular case." *People v. Jackson*, 28 Cal.3d at 316, 618 P.2d at 176. Accord, *People v. Zapien*, 4 Cal.4th 929, 990, 846 P.2d 704, 739, *cert. denied*, 114 S. Ct. 315 (1993). Notwithstanding the court's confidence, as a result of the lack of clarifying instructions prosecutors and trial judges in many cases have construed the absence of these mitigating factors as the presence of aggravating factors, permitting illusory aggravation to be weighed in favor of a death sentence.

The following examples are typical of the ways in which prosecutors have encouraged juries to use the absence of mitigating factors as aggravating factors, thereby distorting the weighing process and adding artificial weight to death's side of the scale:

- Illustrating the point with a homemade scale, the district attorney deemed all of the statutory factors to be aggravating, except for the absence of prior felony convictions, and assigned numerical values to each, resulting in a "score" of 22 aggravating points versus 3 mitigating points.[50]

- The district attorney argued that the circumstances of the crime was an aggravating factor, but the absence of prior violent acts was mitigating. He noted that the defendant's prior conviction for a felony was an insignificant aggravating factor. He then classified all the remaining factors except (k) as aggravating. He argued that there were two mitigating and nine aggravating factors. He prepared a chart listing these factors, which the jury took into the jury room. During deliberations, the jury requested a copy of the instructions on which "the chart prepared by the District Attorney was prepared."[51]

Prosecutors have included the absence of statutory mitigating factors in their pretrial notices of aggravation filed with the court

(i) (petitioner's age) — were aggravating factors (RT 1476-81, 1532-34).

[50] *People v. Gonzalez*, 51 Cal.3d at 1233-34, 800 P.2d at 1188.

[51] *People v. Hamilton*, 48 Cal.3d at 1190, 774 P.2d at 759 (Broussard, J., concurring and dissenting).

and served on the defense,[52] and in closing argument have characterized factors (d),[53] (e),[54] (f),[55] (g),[56] (h),[57] and even factor (k),[58] as factors in aggravation, both before and after the state court's decisions construing those factors as mitigating only.

Even in the absence of such prosecutorial arguments, there is no reason to believe that without judicial guidance jurors will correctly interpret the factors. As the state court has recognized, the wording of the statute—and of the instruction patterned upon it—is ambiguous. The use of the phrase "whether or not" is susceptible to the interpretation that the absence of a mitigating factor has some aggravating significance. *People v. Davenport*, 41 Cal.3d at 289, 710 P.2d at 888. Thus the practice of instructing

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[52] *See, e.g., People v. Beardslee*, 53 Cal.3d 68, 112, 806 P.2d 1311, 1336, *cert. denied*, 112 S. Ct. 449 (1991).

[53] *See, e.g., People v. Gonzalez*, 51 Cal.3d at 1233-34, 800 P.2d at 1187-88; *People v. Allison*, 48 Cal.3d 879, 901-02, 771 P.2d. 1294, 1310-11 (1989), *cert. denied*, 494 U.S. 1090 (1990); *People v. Davenport*, 41 Cal.3d at 288-89, 710 P.2d at 888.

[54] *See, e.g., People v. Kelly*, 1 Cal.4th 495, 548-49, 822 P.2d 385, 416 (1992), *cert. denied*, 113 S. Ct. 232 (1992); *People v. Gallego*, 52 Cal.3d 115, 200, 802 P.2d 169, 214 (1990), *cert. denied*, 112 S. Ct. 337 (1991); *People v. Gonzalez*, 51 Cal.3d at 1233-34, 800 P.2d at 1187-88; *People v. Lucero*, 44 Cal.3d at 1031 n.15, 750 P.2d at 1356-57 n.15.

[55] *See, e.g., People v. Kelly*, 1 Cal.4th at 548-49, 822 P.2d at 416; *People v. Gallego*, 52 Cal.3d at 200, 802 P.2d at 214; *People v. Lucero*, 44 Cal.3d at 1031 n.15, 750 P.2d at 1356-57 n.15.

[56] *See, e.g., People v. Montiel*, 5 Cal.4th 877, 936, 855 P.2d 1277, 1311 (1993); *People v. Allison*, 48 Cal.3d at 902, 771 P.2d at 1310; *People v. Davenport*, 41 Cal.3d at 288-89, 710 P.2d at 888.

[57] *See, e.g., People v. Gonzalez*, 51 Cal.3d at 1233-34, 800 P.2d at 1187-88; *People v. Davenport*, 41 Cal.3d at 288-89, 710 P.2d at 888.

[58] *People v. Brown*, 46 Cal.3d at 455, n. 10, 758 P.2d at 1150 n.10: "In his summation, the prosecutor told the jury that 'each of those factors'—apparently, even the alleged *absence* of mitigating evidence under factor (k) ('Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime')—'is an aggravating factor . . .' " (emphasis in original).

on the statutory mitigators, even when they are factually irrelevant, invites the jury to aggravate upon the basis of non-existent factors. Cf. *McCleskey v. Kemp*, 481 U.S. 279, 314 n.37 (1987) (recognizing that "[i]t would be improper and often prejudicial to allow jurors to speculate as to aggravating circumstances wholly without support in the evidence"). Indeed, even trial judges, who are more skilled than jurors at interpreting the law, have, in a number of cases, assigned aggravating weight to the absence of mitigating factors.[59]

An aggravating factor that is based on the absence of one of California's enumerated mitigating factors is the quintessence of an illusory aggravating factor. The California court itself has recognized that some of the factors, including factor (e), victim participation, and factor (f), moral justification, are so unusual that to allow the absence of these factors to be considered aggravating factors is to make them automatically applicable to most murderers. *People v. Davenport*, 41 Cal.3d at 289, 710 P.2d at 888. Those factors that may occur somewhat more frequently, such as minor participation, duress, or extreme mental disturbance, nevertheless still exist in only a small minority of cases. An aggravating factor that exists in nearly every capital case fails to fulfill its purpose, which is to guide the jury in distinguishing "those who deserve capital punishment from those who do not." *Arave v. Creech*, 507 U.S. ____, 113 S. Ct. 1534, 1542 (1993).

A sentencing process that allows the jury to weigh aggravating factors based on the absence of mitigating factors creates both of the risks that *Stringer* recognized violate the Eighth Amendment. Because such a process creates aggravating factors that do not

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[59] *See, e.g., People v. Kaurish*, 52 Cal.3d at 717, 802 P.2d at 316 (trial judge concluded that factor (h) was aggravating because the defendant had the capacity to appreciate the criminality of his conduct and was not impaired by intoxication); *People v. Hamilton*, 48 Cal.3d at 1186, 774 P.2d at 757 (trial court concluded that one factor, the absence of prior violent criminal activity, was mitigating, and that the remaining 10 factors, including factor (k), were aggravating); *People v. Brown*, 46 Cal.3d at 462, 758 P.2d at 1155.

rationally make the defendant more deserving of death, it "creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." *Stringer v. Black*, 503 U.S. ____, 112 S. Ct. 1130, 1139 (1992). Because such a process artificially inflates the number of aggravating factors the jury weighs, it "creates the possibility not only of randomness but of bias in favor of death." Id.[60]

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[60] The jury's consideration of the *absence* of "extreme" mental or emotional disturbance, "extreme" duress or the "substantial" domination of another person (Cal. Penal Code §§ 190.3(d) and (g) (Deering 1994)) as an aggravating factor is unacceptable under the Eighth Amendment for an additional reason. The text of these factors requires the jury to make an inherently amorphous determination regarding the degree of disturbance and domination. Aggravating factors that include terms like "extreme" and "substantial" do not provide sufficient guidance to avoid arbitrary and capricious sentencing. See, e.g., *State v. David*, 468 So.2d 1126, 1129-30 (La. 1984), *cert. denied*, 476 U.S. 1130 (1986) (holding vague an aggravating factor which allowed the jury to impose death based upon a "significant" history of criminal conduct); *State v. White*, 395 A.2d 1082 (Del. 1978) (holding vague an aggravating factor in which the victim was defined as "elderly" or "defenseless"); *Arnold v. State*, 224 S.E.2d 386, 391-92 (Ga. 1976) (holding vague an aggravating factor which allowed the jury to impose death based upon a "substantial" history of assaultive convictions).

CONCLUSION

For the foregoing reasons, the judgments of the California Supreme Court affirming petitioners' death sentences should be reversed.

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Respectfully submitted,

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